

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
UNITED STATES OF AMERICA, : 18-cr-00204-NGG-VMS
:
- versus - : U.S. Courthouse
: Brooklyn, New York
RANIERE, et al., :
Defendant : December 6, 2018
-----X

TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE VERA M. SCANLON
UNITED STATES MAGISTRATE JUDGE

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1 THE CLERK: Criminal Cause for a Status
2 Conference, case number 18-cr-204, United States v. Keith
3 Ranieri, Allison Mack, Clare Bronfman, Kathy Russell,
4 Lauren Salzman, Nancy Salzman.

5 Counsel, can you state your appearance starting
6 with the government, please?

7 MS. PENZA: Moira Kim Penza, Tanya Hajjar and
8 Shannon Jones for the United States.

9 Good morning, your Honor.

10 THE COURT: Good morning.

11 MR. SOLOWAY: Good morning, your Honor.

12 Robert Soloway representing Nancy Salzman who
13 is excused today and we waive her appearance.

14 MS. GERAGOS: Good morning, your Honor.

15 Teny Geragos and Paul DerOhannesian for Keith
16 Ranieri, who waives his appearance today.

17 MR. DIAZ: Good morning, your Honor.

18 Hector Diaz and Andrea Tazioli for Lauren
19 Salzman, who is present, seated in the back.

20 THE COURT: Okay.

21 MR. MCGOVERN: Good morning, your Honor.

22 Bill McGovern and Sean Buckley here today for
23 -- representing Allison Mack, who is also seated in the
24 back.

25 MS. HARRIS: Good morning, your Honor.

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1 Justine Harris for Cathy Russell. We waive her
2 appearance today. She's actually checking in with
3 pretrial --

4 THE COURT: Okay.

5 MS. HARRIS: -- during the court conference.
6 Thank you.

7 THE COURT: Okay.

8 MS. CASSIDY: Good morning, your Honor.

9 Kathleen Cassidy and Caroline Grossands (ph.)
10 on behalf of Ms. Bronfman. Ms. Grossands is seated here
11 with your permission if that's all right, your Honor.
12 She's not yet admitted in this district but she is an
13 attorney in my office who has been assisting me.

14 THE COURT: That's fine.

15 MS. CASSIDY: And Ms. Bronfman waives her
16 appearance today.

17 THE COURT: Okay. All right. And then on the
18 phone? Can you hear me?

19 MR. SULLIVAN: On the phone is -- yes, I can.
20 On the phone is Michael Sullivan on behalf of NXIVM, your
21 Honor.

22 THE COURT: Okay. So we're having this
23 conference to touch on a couple of issues. There may be
24 some scheduling issues or other items that you end up
25 discussing with the district judge and you have a

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1 conference with him after this, so we will have a working
2 plan and then adjust accordingly.

3 So the issue that prompted scheduling this is
4 the government's letter that there may be some confusion
5 about particular privileges. That's why I asked Mr.
6 Sullivan to be on the phone and the approach that should
7 be taken for briefing the privilege issues which need to
8 get going in short. It seems a question of who is going
9 to do that work on the government's side.

10 But let me check in with you all and see if any
11 progress on any of the issues that have been identified
12 in your letter and any further production of materials?

13 MS. PENZA: Good morning, your Honor.

14 THE COURT: Good morning.

15 MS. PENZA: So since the government submitted
16 its letter to your Honor, we have received an updated
17 privilege log from counsel for NXIVM which did remove
18 certain items that had appeared obvious, they're not
19 privileged to the government and we -- so we understand
20 that there may be some movement on NXIVM's part.

21 However, there are still significant areas of
22 inconsistency between what NXIVM has asserted regarding
23 privilege and what we are hearing from the defendants.

24 Additionally, we are -- one significant area of
25 -- that has impeded progress is that Nancy Salzman, who

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1 is president of NXIVM or was president of NXIVM, did not
2 assert any privileges on behalf of NXIVM over the devices
3 seized from her home.

4 At current estimate, your Honor, there are
5 about a million documents, maybe more on those devices.
6 We have -- the government was confused, based on the fact
7 that she was not asserting any privileges on behalf of
8 NXIVM, whereas defendants Clare Bronfman and Keith
9 Ranieri, as to their own email account, did assert
10 certain privileges on behalf of NXIVM, so the government
11 found it unusual and difficult to understand Nancy
12 Salzman's nonassertion of any privilege on behalf of
13 NXIVM.

14 That being said, we have now been in
15 communication with counsel for NXIVM, attempting to
16 ascertain what attorneys they are claiming privileges
17 over. We had discussions with them. We sent a letter on
18 November 21st, 2018, asking for a list of attorneys. We
19 still have not received that list. And so that has now
20 stalled the review process.

21 The government has now asked to segregate NXIVM
22 materials from the trial team's view until we can
23 establish which attorneys NXIVM is asserting a privilege
24 over as to the materials in Nancy Salzman's house.

25 As it stands, there are already tens of

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1 thousands of documents, I believe, on the privilege side
2 of the wall. We anticipate there will be more, given a
3 review of -- once there are -- once NXIVM asserts any
4 privileges over Nancy Salzman's devices, which I
5 understand they intend to do.

6 So we are talking about a significant quantity
7 of potentially privileged material. However, the
8 government believes based on its review of nonprivileged
9 material that a significant portion of what is being
10 asserted as potentially privileged will not be privilege,
11 either because there is third-party waiver or some other
12 exception.

13 And the government's position now is that there
14 are large categories of these tens of thousands of
15 documents that can be dealt with wholesale, without doing
16 a document by document analysis. And the model that the
17 government seeks to implement is the same that was set
18 forth in FIFA where there are categories of documents
19 where there can be a discussion with the trial team who
20 has knowledge of many facts out that are not privileged
21 and where we can litigate those issues.

22 We believe that will be the most efficient way
23 to hopefully deal with large categories of the documents
24 over which the defendants are claiming there is a
25 potential privilege.

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1 To the -- the same way that it was done in FIFA
2 is that where that litigation does not require a document
3 by document analysis, it will be handled by the trial
4 team.

5 If there needs to be supplemental briefing or
6 the Court needs to hear separately regarding individual
7 documents, then our firewall team will be in a position
8 to discuss that with your Honor. But if there is no need
9 for a document by document analysis, the most efficient
10 way for this to happen is to have the trial team engage
11 in the litigation.

12 THE COURT: Okay. So is that plan outlined in
13 that transcript that you cited in your letter, before
14 Judge Levy or is there an order from FIFA -- the FIFA
15 case that memorializes that process?

16 MS. PENZA: I don't believe so, your Honor.

17 THE COURT: Okay.

18 MS. PENZA: Because it was not -- I don't --
19 Judge Levy set that as the manner in which he intended to
20 proceed.

21 THE COURT: Okay.

22 MS. PENZA: And so there were two rounds of
23 briefing and a hearing; one with the prosecution team and
24 one with the firewall team.

25 THE COURT: Okay. All right. Does anybody want

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1 to say anything just about the NXIVM or is it just Mr.
2 Sullivan? Do you want to speak to it?

3 MR. SULLIVAN: Your Honor, I would be happy to
4 at least respond to a couple of the points.

5 THE COURT: Uh-hum.

6 MR. SULLIVAN: I would say that I am not
7 prepared necessarily to respond to them all. I
8 understood based on the government's letter to the Court,
9 and the Court's requested me to participate, was to
10 provide maybe some clarity with regard to at least a
11 piece of the confusion that is being raised by the
12 government and I'm pleased to do that.

13 If there are other requests by the government,
14 I am happy to speak with the government about their other
15 requests to see if we could be as expedient as possible.

16 But the two issues that I thought the
17 government had raised as potential confusion, were
18 contradiction between NXIVM and what we have been
19 presented by some of the defense teams was the one issue,
20 was the issue concerning Jonathan Ware, as to whether or
21 not he represented NXIVM in any regards and your Honor I
22 have -- I don't believe I ever indicated any lawyers that
23 did or did not represent NXIVM in any of the
24 communications or calls with the government.

25 So maybe the government has heard something

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1 regarding Jonathan Ware but Jonathan Ware is counsel to
2 NXIVM in some respects. So hopefully that clears up some
3 of the confusion.

4 The other confusion or contradiction raised by
5 the government is this issue concerning whether or not
6 there's a joint defense agreement or any common interest
7 agreement amongst the various defendants in the
8 corporation NXIVM. And my recollection of the
9 communication, your Honor, regarding that with the
10 government was I represented to the government that I had
11 not come across any written joint defense agreements but
12 I wanted to be clear that it could be that there was
13 common interest agreements between some or several of the
14 defendants in the other company at some point in time. I
15 just have no discussions with any of the defense
16 attorneys regarding that point.

17 So I don't want the Court to believe that NXIVM
18 is taking the position that there is no common interest
19 agreement. So I wanted to point out to the government
20 that I had not come across any written joint defense
21 agreements but was not -- I was not -- I had not had any
22 discussions, so that people could be raising common
23 interest agreements between themselves and not NXIVM.

24 So hopefully, your Honor, that helps in terms
25 of clarifying those two points that were raised as it

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1 related to me and now NXIVM.

2 THE COURT: And do you think if you had
3 additional conversations with the government about
4 NXIVM's position, that that would be fruitful?

5 MR. SULLIVAN: I'm sorry, your Honor. I
6 apologize. I am in a public place and I'm getting some
7 background noise.

8 THE COURT: All right. So you said you weren't
9 -- there were some issues you weren't prepared to discuss
10 and it sounds like you're not in the best place to have
11 the conversation anyway but do you think if you --

12 MR. SULLIVAN: Well, it is --

13 THE COURT: -- had another conversation or
14 other conversations with the government, do you think
15 that could be fruitful as to elaborating on NXIVM's
16 position with regard to some privileges or particular
17 documents or whatever it is that you're referring to?

18 MR. SULLIVAN: Well, yes, I think that would be
19 very fruitful, your Honor, particularly the government
20 has requested and NXIVM is preparing a list of counsel
21 that have represented NXIVM on several matters and I will
22 tell you, it is not an easy list to put together, your
23 Honor. There's not one central location in terms of
24 putting this information together but we're in the
25 process of putting that together.

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1 And that would -- I'm optimistic then we would
2 be able to get at least an initial list for the
3 government by close of business tomorrow regarding
4 attorneys.

5 The other issue that they referenced concerning
6 documents that were taken during the search warrant that
7 has been identified as potentially privileged documents
8 relating to NXIVM and I heard the government say this
9 morning, it's about 10,000. We're pleased to have a
10 conversation with the government --

11 THE COURT: No, I think it's more. I think
12 it's tens of thousands. There's an S there.

13 MR. SULLIVAN: Oh. Well, we're pleased to have
14 a conversation with the government about that. My only
15 comment to the government regarding that, since we've not
16 had an opportunity to see any of those documents or
17 category of those documents, is that NXIVM was not
18 waiving any of the privileges it may have concerning any
19 of those.

20 So a further discussion with the government
21 would be helpful, at least trying to come up with a plan
22 that would be reasonable under the circumstances.

23 THE COURT: So when you say you're going to
24 produce a list of attorneys by COB tomorrow, then when do
25 you think your fairly complete list would be ready? If

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1 you're producing something that --

2

3 MR. SULLIVAN: Well, I think it's going to be
4 fairly complete by tomorrow, your Honor.

5 THE COURT: Okay.

6 MS. PENZA: We probably just want to reserve
7 the right to add to it but I think we'll have a fairly
8 complete list by tomorrow.

9 THE COURT: All right. The government, did you
10 want to say anything just in response?

11 MS. PENZA: Nothing, your Honor.

12 THE COURT: No, okay. So in terms of a time
13 line for having conversations and then getting back to me
14 if there are issues -- I mean they may end up being
15 intertwined with what we're going to talk about with the
16 other defendants but do you all have a working time line
17 for you to discuss things?

18 MR. SULLIVAN: Is that to me, your Honor, or
19 just the government?

20 THE COURT: Yes. I'm sort of speaking to you
21 and looking at the government, whoever wants to pitch in
22 about this point. You know, Monday?

23 MR. SULLIVAN: Well, Monday, your Honor, I'm
24 actually at the deposition all day. I would say either
25 Tuesday or Wednesday of next week your Honor would work

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1 for me.

2 And I will say and I think the government would
3 agree, that whenever the government has requested an
4 opportunity to have a communication with me, I've made
5 myself available both during and after regular business
6 hours.

7 THE COURT: Just wait for the government. What
8 do you think?

9 MS. PENZA: Your Honor, we're happy to await
10 the list from Mr. Sullivan. I will say that it -- I'm a
11 little worried about the pace of matters. A list is only
12 the preliminary step. If we can then have a conversation
13 in quick order, we can then report to the Court on
14 outstanding issues. We expect there will be outstanding
15 issues.

16 THE COURT: How does next Tuesday work for you
17 to talk to him and then, you know, get back --

18 MS. PENZA: That's fine.

19 THE COURT: We'll probably have a global date
20 for this conference but -- all right. So your plan, Mr.
21 Sullivan, is to talk to the government on Tuesday about
22 as many of these issues as possible?

23 MR. SULLIVAN: Thank you, your Honor.

24 THE COURT: Okay. All right. On this issue
25 and overlapping with NXIVM, does anybody want to say

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1 anything here? Any of the other counsel? No. Okay.

2 All right.

3 Then on the plan for how to deal with
4 privilege, you all had a different view that it should
5 not be the attorneys primarily litigating the case and
6 the two rounds of briefing, you should try to just have
7 the attorney dealing with the attorney dealing with the
8 privilege materials be the point person for all of the
9 briefing on the privilege.

10 MS. CASSIDY: Yes, your Honor, our primary
11 concern is that the government is in possession of
12 thousands and thousands, as they have said, of our
13 client's privileged materials. The prosecution team or
14 the firewall team and cc'ing the prosecution team is
15 currently making requests of us that require us to
16 disclose information from our clients that goes to the
17 very issues that they are investigating in this case.

18 In our experience, as defense lawyers dealing
19 with these issues, this is very atypical. Usually the
20 taint team is entirely walled off from the prosecution
21 team and they review the privileged documents and confer
22 with defense counsel about any areas of dispute or
23 questions about the scope of the privilege.

24 And ordinarily, your Honor, I think the
25 firewall teams are very careful teams are very careful to

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1 keep their activities entirely separate from the
2 prosecution teams.

3 And here what the government is proposing is
4 very problematic to us. They're -- you know, as I said,
5 their firewall attorney keeps cc'ing the prosecution
6 teams on emails to us seeking information and the
7 prosecution team is asking for additional information
8 beyond what we've provided, which lists the attorneys and
9 the matters and the dates of representation.

10 The government should not gain the right to
11 discovery from our clients by nature of having seized
12 their privileged materials. I think this is a serious
13 Fifth Amendment problem and I think any responses that we
14 are giving in response to their questions necessarily
15 requires to get into the substance of the communications
16 and requires to disclose information that goes to exactly
17 what they're investigating in this case.

18 So I am very comfortable having conversations
19 with the firewall attorney in order to try to address
20 documents on a category by category basis and respond to
21 their concerns about the scope of the privilege but it is
22 the involvement of the prosecution team that is of great
23 concern to me.

24 MS. JONES: Your Honor, may I be heard briefly
25 on this?

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1 THE COURT: You can stay seated.

2 MS. JONES: I am very cognizant of my
3 obligations as a firewall team not to disclose the
4 content of any privileged communications to the trial
5 team. I have not done that. I will not do that.

6 However, in this case and has been my
7 experience dealing with privileged documents before too
8 on a prosecution team, it is entirely appropriate for the
9 trial team to know who are the attorneys that are being -
10 - a privilege is being asserted on behalf of, who is
11 asserting the privilege and I would ask what I have been
12 copying the trial team on are requests about plea
13 identify the attorneys you're asserting a claim on,
14 please identify on behalf of whom you're identifying that
15 you're asserting a privilege on and then also I have
16 asked them to identify the scope of the privilege because
17 in this case, the privilege issues are extraordinarily
18 complicated because all of the defendants have been
19 sharing the same attorneys and those attorneys have been
20 handling different matters for different entities.

21 And so on many of the documents there are like
22 -- you know, there could be a host of people who are
23 included on those documents and it's very clear that in
24 some instances, it has nothing to do with whatever the
25 privilege holder would be able to retain privilege for.

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1 For example, there is an attorney Arlen Olsen,
2 who represented all of the defendants on different
3 matters, so I would ask them to each identify for me on
4 what matter -- what was the scope of the matter, so we
5 can sort of separate out who is representing who for what
6 purposes.

7 So if there are third-parties who are copied on
8 that, then we can figure out is the privilege there or
9 has the privilege been waived? For example, for Nancy
10 Salzman, I still don't even know like what matters Mr.
11 Olsen represented her on, although I do know for the
12 other two defendants what the claim scope is.

13 I asked the defendants to give me like just a
14 general, like, representative list and the list came back
15 as represented in this litigation or -- as a matter of
16 fact, I think in order to not talk about this in the
17 abstract, I would like to give your Honor a copy of the
18 chart that they gave me.

19 THE COURT: All right. Everybody has a copy of
20 that?

21 MS. JONES: I think this is, Judge, for Clare
22 Bronfman and this is also a copy of the redacted version
23 that they provided to the trial team.

24 So when they first gave this to me, they asked
25 me not to share this with the trial team. I did not

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1 share it with the trial team but when I reviewed this, I
2 did not understand why they were asserting privilege over
3 the scope of the representation and I asked them well, if
4 there are particular matters that you believe should be
5 redacted for privilege purposes, let's discuss that.

6 Ultimately, they ended up giving the redacted
7 version to the trial team but you can see from the
8 redactions that they redacted a lot of material that I
9 don't understand under what basis the redaction is
10 occurring. Like why the fact that an attorney
11 represented a particular defendant in a litigation and
12 why that would be privileged.

13 And the reason why I think this is important is
14 to the extent that there are privilege issues that relate
15 to the scope of the privilege, how the privilege is
16 waived, whether or not there is a common interest
17 agreement, that does not depend on any of the content of
18 the documents.

19 The trial team is in a much better position
20 with their knowledge of the facts about what's relevant
21 and what's important to have those rights rather than me
22 arguing over all of these privilege issues where it
23 doesn't matter what the documents are. The matter is is
24 there a privilege? What's the scope of the privilege?
25 Is it being properly asserted? What would waive that?

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1 And that doesn't depend on the content.

2 And I think that is something that the trial
3 team is in a much better position to handle than me. I
4 would like to focus on document review and once the scope
5 of the privilege is defined and I have a good
6 understanding as to what it is and who is claiming what,
7 then we can have, you know, a document by document
8 discussions but there are thousands and thousands of
9 documents.

10 So to the extent that there is like a huge
11 category of things where it's like, okay, this is not
12 privileged, and it doesn't matter what the documents say,
13 that that's something for the trial team could handle.
14 So -- yes.

15 THE COURT: All right. Do you want to say
16 anything?

17 MS. CASSIDY: Your Honor, I don't really
18 understand why the prosecution team needs to be involved
19 in this when Ms. Jones could handle this -- these
20 discussions and this litigation. I think it would be
21 much more efficient if we could have a process where -- I
22 am not saying we need to do this on a document by
23 document basis, if she comes to us with questions about a
24 certain type of document, the inclusion of a third-party
25 on certain things, we will be happy to answer those

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1 questions.

2 But just as an example, your Honor, to date,
3 the questions that have been asked of us are about
4 various immigration matters involving attorneys that we
5 identified as having privileged communications with Ms.
6 Bronfman. Some of these immigration matters, one of them
7 is charged as an act -- a racketeering act against Ms.
8 Bronfman. Others, I believe, are under investigation,
9 that they may charge as part of their superseding
10 indictment.

11 So any disclosure that I am required to give to
12 the prosecution team I believe is in violation of Ms.
13 Bronfman's Fifth Amendment rights and I understand that
14 we have the burden of establishing the privilege but I
15 want to have those conversations with the taint team, so
16 that we can work out if there are any areas of
17 disagreement and we may agree on a lot of matters. But I
18 do not understand the need for the prosecution team to be
19 involved at this stage.

20 THE COURT: All right? Anybody else want to
21 weigh in?

22 MS. GERAGOS: I would just add that with
23 respect to Mr. Ranieri, when the taint team has asked us
24 about certain litigations, we have said with respect to
25 some communications or third-parties on emails that Mr.

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1 Ranieri has, that those will no longer be privileged.

2 So we are working, I think, expeditiously with
3 respect to some of the documents to say that if they
4 believe that some of the documents are not privileged, we
5 will then agree and we have done that in the past.

6 MS. PENZA: Your Honor, if I may just be heard
7 briefly. One example of -- that we're dealing with in
8 terms of like these immigration matters, is that there
9 are very unusual privileges being claimed.

10 So for example, in the redacted chart from Ms.
11 Bronfman, she is asserting privilege over communications
12 between Mariana Fernandez and an attorney. Mariana
13 Fernandez is Keith -- the mother of Keith Ranieri's
14 child.

15 We have reviewed documents, immigration
16 documents, relating to the immigration procedures that
17 Mariana went through. There is -- the government
18 believes that we are in a position right now to litigate
19 whether there could possibly be any privilege between
20 Clare Bronfman and an attorney over Mariana's immigration
21 issues.

22 THE COURT: All right.

23 MS. PENZA: And we are in the place to do that.
24 Ms. Jones should haven't to get up to speed on all of
25 those issues when we are already in the place to do that

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1 based on our knowledge of the facts of the case.

2 MS. CASSIDY: Your Honor, this goes exactly to
3 my point, Ms. Mariana Fernandez is one of the Jane Does
4 listed in the indictment. This is an area that the
5 government is actively investigating against Ms.
6 Bronfman. I am happy to litigate this with Ms. Jones.
7 We may be able to work something out. In the immigration
8 context, I believe that there is a doctrine of dual
9 representation. It's not necessarily true that just
10 because the sponsor of the visa is copied, as well as the
11 potential visa holder on the email, that that destroys
12 the privilege.

13 These are areas that are very fact-specific.
14 There are different types of visas that were considered.
15 There are different lawyers consulted on these matters
16 and it inevitably gets into the content of the documents.

17 Ms. Jones and I can have I think, a very
18 productive dialogue about the areas where we may agree
19 and the areas where we may not agree and that if there is
20 anything to be litigated, we will litigate it but I do
21 not think that I should be required to disclose
22 information about -- that goes exactly to the
23 government's investigation to the prosecution team in
24 order to try to protect documents that I have a basis to
25 believe are privileged.

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1 THE COURT: It seems like this is an efficiency
2 question because we have privileged disputes all the time
3 where the other side knows nothing about the documents.
4 So the fact that you could actually have somebody seeing
5 the documents and have the kind of meaningful
6 conversation that you're talking about, actually does not
7 happen very often and often, I am the one who knows what
8 it being said and one side is in the dark.

9 And sometimes it's the disputes are productive
10 and sometimes I just make the decision about but here,
11 you have the opportunity to have an informed colleague,
12 the privilege team, actually know what the document says
13 and have a conversation.

14 So this is really from my perspective, you
15 could do it in the way that you're suggesting as was done
16 in FIFA. So the person has more context, can make the
17 arguments but there's no doubt, if we do this with the
18 main trial team as the attorneys handling the privilege,
19 that this is going to have to be done in two rounds
20 because if we have somebody who has -- we may be able to
21 deal with many of the issues, like you're saying with
22 your example of the immigration question or there are
23 probably, you know, half a dozen other examples you could
24 give me but there is likely to be some other areas that
25 it would really be much more helpful if the attorney

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1 actually had seen the documents.

2 So this is really kind of a resource question
3 and how quickly you can do this and segregate out which
4 issues the trial team is well-positioned to deal with and
5 which ones you can't deal with and your colleague will
6 need to deal with.

7 And, you know, it's the issue that's been
8 looming in this case the whole time is you're on a pretty
9 quick calendar. So I don't actually know what the two
10 rounds of briefing, how much time that took in the FIFA
11 case. Do you have a sense? I feel that you would do
12 this seriatim. I don't want to have to -- you having
13 overlapping briefing, if that's the approach that's
14 taken.

15 MS. PENZA: Your Honor, I am not sure about the
16 exact time frame. I know that there was a hearing
17 initially. The idea -- the reason why the government
18 believes this would be the most efficient means to
19 proceed is just to establish the scope and validity of
20 the privilege before getting into any disputes relating
21 to the documents.

22 It's also important just more broadly that we
23 understand the general scope --

24 THE COURT: Right, I understand.

25 MS. PENZA: -- just to be able to segregate out

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1 other material that we may have and so we're prepared to
2 move quickly but we do need the information,
3 nonprivileged information in -- the basis for the
4 asserted privilege, so that we can identify which
5 privileges we seek to argue are waived or that the
6 inclusion of a certain individual would result in third-
7 party waiver, in the abstract.

8 And then Ms. Jones, to the extent there are
9 additional disputes relating to actual documents, I think
10 that would be the time to litigate them.

11 THE COURT: All right. Anybody else care about
12 the briefing schedule here? We can do it in two rounds
13 where the trial team, you deal with the issues that you
14 believe you can deal with and then whatever is left, then
15 Ms. Jones and her colleagues can deal with.

16 That being said, there's no waiver by the
17 defendant by not being able to raise material in order to
18 really make clear what their position is. So if the
19 defendant who is putting in their presentation, if --
20 whatever, an individual defendant or defendants together,
21 says you really need to look at this document and we need
22 to provide the Court ex parte with information about it
23 and then the government can't respond because you can't
24 see it, then you know, it's not creating any problem for
25 the defendants. What it is really going to do is just

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1 push that issue over to Ms. Jones' team, I mean, or I
2 will deal with it but you are absolutely setting it up
3 for the government not to have access to information that
4 might help you make a stronger case and pushing it a
5 little bit down the line, which means in order to be able
6 to do this on two separate rounds of briefing, this is
7 going to have to happen fairly quickly.

8 MS. PENZA: Your Honor, just one point of
9 clarification in terms of what the government was
10 proposing which in line with FIFA is that rather -- it's
11 not -- we're not really proposing two rounds of briefing.

12 THE COURT: Okay.

13 MS. PENZA: What we are proposing is that the
14 trial team submit briefing on issues that we believe we
15 can litigate without seeing documents and then the
16 firewall team can submit a separate supplemental briefing
17 under seal from the trial team in order -- and so really
18 in terms of efficiency, we don't expect that there are to
19 be multiple rounds.

20 One issue that I do want to raise with your
21 Honor is that there have been additional -- which we
22 brought up at the last conference, but there have been
23 additional emails obtained from both Keith Raniere and
24 Clare Bronfman. We are hopeful that this process will
25 cover many of the issues that would be implicated in the

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1 additional thousands of emails, tens of thousands of
2 emails that we have from those new warrants but I did
3 just want to raise that with your Honor, so that you knew
4 right now the universe in which we're working with is not
5 necessarily all of the emails.

6 THE COURT: All right. I am not sure. Maybe
7 defense counsel, you can comment. It would seem to me
8 there are going to be some issues and I don't know what
9 they are but even just looking at these two different
10 logs, the redacted and unredacted one, that there are
11 going to be some issues that you believe -- you, the
12 trial team believe you can deal with that defendants want
13 to raise detailed information with me about the
14 particular privilege that they are not comfortable and
15 don't believe they should disclose to you.

16 That's what I was talking about when I say two
17 rounds basically. You think it's okay. They can respond
18 to some percentage of what you offer but there's going to
19 be part of that that needs to get pushed over to Ms.
20 Jones and is not what you had identified as something
21 that Ms. Jones has said of the government's effort needed
22 to deal with, so --

23 MS. PENZA: We understand, your Honor.

24 THE COURT: I guess the reason that I think it
25 may be helpful to -- and we're going to do this -- but to

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1 follow the FIFA model is this is a complex case and it
2 seems to me that the counsel who are the trial team do
3 have the bigger overview. It's nothing bad about Ms.
4 Jones, I just know you're in the --

5 MS. JONES: This is not -- I'm not on this
6 team.

7 THE COURT: -- in the midst of the documents.

8 MS. JONES: I'm not on the prosecution team.

9 THE COURT: So for me, having the information
10 put in that context I think would be most helpful for
11 resolving this and then, you know, Judge Garaufis needs
12 to look at it as well and then the same thing.

13 So what are you proposing is your schedule for
14 moving through --

15 MS. CASSIDY: Your Honor, if I could just --

16 THE COURT: -- I'm sorry, yes.

17 MS. CASSIDY: -- speak to the efficiency point
18 that you raised. I mean I think this will inevitably
19 involve significant ex parte submissions from us on
20 issues that we may actually be able to resolve if we
21 could just engage in discussions with the firewall team
22 alone and avoid the need for litigation on these topics.

23 THE COURT: I think you're probably correct and
24 I think we should think about that in the schedule. We
25 have maybe the briefing and build in a bit of time for

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1 you to identify those issues, try to split them out if
2 you want to have that conversation and take it out of
3 briefing, that's possible.

4 MS. CASSIDY: I think there are probably
5 significant swaths of these tens of thousands of
6 documents that we can put aside that are clearly
7 privileged and then there are going to be a smaller set
8 of documents that involve attorneys where there may be
9 third-parties copied, there may be more complicated
10 issues of who is the client, that if we have time to have
11 a dialogue about -- I mean, we've answered Ms. Jones'
12 questions to the extent that she's asked them. We've
13 provided her with a very detailed chart of all of the
14 matters that we could identify. We haven't gone through
15 -- I am not saying that we've looked at every single one
16 of these documents because we haven't, so there may be
17 additional matters and representations that come up.

18 But if we can have a dialogue about that, we
19 may agree with her. I mean, we are not going to take a
20 frivolous position on privilege and we don't think it's
21 necessary to litigate such things before your Honor and
22 waste the Court's time and everyone's time. And if we
23 could narrow the areas of dispute, it may be that we
24 don't need this initial round of briefing in the abstract
25 and if we do have this initial round of briefing in the

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1 abstract, I think it will inevitably require ex parte
2 submissions to your Honor that maybe we could avoid.

3 THE COURT: So I think it's probably true there
4 will be the ex parte. The question I think I am hearing
5 now is the timing of the briefing. Do you think there's
6 a small window that you could be having a productive
7 conversation and only after that, this briefing should
8 start or --

9 MS. CASSIDY: I think that's really more a
10 question for the firewall team because I don't know how
11 far they are in their review. We are answering questions
12 as they arise.

13 MS. JONES: Your Honor, one of the stumbling
14 blocks that has sort of slowed this process down a little
15 bit is identifying which entity is asserting the
16 privilege. We had -- I was given an initial draft of
17 documents that listed attorneys and the -- who they were
18 asserting their privilege on behalf of and then the
19 revised more detailed chart, at least from Ms. Bronfman's
20 attorneys, things sort of moved around as to what
21 attorney was asserting -- for example, in one version it
22 was the attorney was representing Keith Raniere and in
23 another version, the attorney was representing a NXIVM
24 and we've been trying to engage with NXIVM counsel about
25 well, who are you asserting the -- what are your

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1 privileges that you're asserting because I would say like
2 maybe a good portion, if not the majority of the
3 privileged communications are the privilege belongs to
4 NXIVM. So it is important to figure out who does the
5 privilege belong to because then we could figure out if
6 the presence of third-parties on that, waives or doesn't
7 waive it.

8 And just having like the very baseline answer
9 of well, whose privilege does this belong to and who can
10 be on that communication and who can't before it was
11 waived, is important and I think that there is still --
12 that's still a little fuzzy, at least for some of the
13 matters and some of the attorneys.

14 THE COURT: All right. Well that's supposed to
15 move forward significantly tomorrow when you get the list
16 from Mr. Sullivan and then --

17 MS. JONES: Well, I already gave Mr. Sullivan a
18 list of the attorneys who Ms. Bronfman and Mr. Ranieri
19 have said these attorneys are representing NXIVM on these
20 matters and I have given that list to Mr. Sullivan more
21 than a week ago, so that he could take a look at it and
22 see if that comports with NXIVM's view as to who is
23 representing NXIVM on what matters.

24 THE COURT: Okay. So well if you get his list
25 tomorrow, then hopefully --

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1 MS. JONES: And that will hopefully move things
2 forward.

3 THE COURT: -- that's all -- you can tell, so
4 you'll know, so then in terms of the conversation, you'll
5 have that information. Then how about you all talking --
6 I mean is it -- I don't --

7 MS. CASSIDY: Yes, I am happy to do that. I
8 think the problem --

9 THE COURT: I understand.

10 MS. CASSIDY: -- from our perspective has been
11 that the prosecution team has been in the loop on those
12 discussions and that is hindering what information we can
13 provide. So if we can have those discussions with the
14 firewall team, I think that will move things forward
15 significantly.

16 MS. JONES: Your Honor, if it's NXIVM's
17 privilege that is being asserted, then I don't understand
18 why it's not Mr. Sullivan who is litigating these issues
19 and not counsel for the individual defendants because
20 they can say these documents are privileged and the
21 privilege belongs to NXIVM but it is, I think -- it's --
22 the discussion should be between me and counsel for NXIVM
23 as to whether or not these documents are privileged, not
24 counsel for Ms. Bronfman, counsel for Mr. Ranieri,
25 counsel for Salzman for NXIVM-privileged documents.

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1 MS. CASSIDY: I don't disagree but it's the
2 company's privilege and that, you know, Mr. Sullivan is
3 going to be the primary point person on those documents.

4 THE COURT: All right.

5 MS. CASSIDY: Those are not --

6 THE COURT: Are you suggesting that there's a
7 class of documents or multiple class of documents, that
8 it would be productive for you to have a conversation
9 with Ms. Jones but not with the trial team involved?

10 MS. CASSIDY: Yes.

11 THE COURT: So --

12 MS. JONES: Okay.

13 THE COURT: -- why don't you do that like early
14 next week, once you have the -- Mr. Sullivan's
15 information, and see where you are at that point. So
16 assuming you have that conversation, what are you
17 thinking in terms of the briefing of this with at least
18 the materials that the trial team thinks that you can --
19 you have enough information to be able to discuss.

20 MS. PENZA: Your Honor, what we're asking for
21 in the first instance is just an unredacted log, similar
22 to what NXIVM has provided us. It doesn't contain
23 privileged information. It says with whom defendants are
24 claiming a common interest privilege, who their attorneys
25 are for what dates and what the basis for the privilege

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1 is.

2 And to advise us about the inclusion of which
3 parties would not in their view, constitute a waiver.
4 Those are very basic questions that don't involve
5 privileged information. They don't involve a detailed
6 recitation of facts. We just need to know that bare
7 minimum in order to proceed in this process but we don't
8 have that because defense counsel has declined to provide
9 that information to us.

10 MS. JONES: Your Honor, I just handed up the
11 redacted and unredacted chart that I was given by counsel
12 from Keith Raniere. As you can see from the scope of
13 representation on the unredacted chart, it is very, very
14 bare bones and I don't understand how any of that is
15 privileged.

16 MS. CASSIDY: Your Honor, this is not a civil
17 case where we are required to create a privilege log.
18 This is a case where the government has in its hands, the
19 privileged documents. In a criminal case, I am not
20 required to provide any information to the prosecution
21 team. This is the subject of the investigation, many of
22 these litigations. It's the subject of some of the
23 charges in the indictment.

24 So I have an obligation, if I want to preserve
25 privilege over these documents to prove that I have a

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1 privilege but I don't need to provide free discovery to
2 the prosecution team in order to do that. I can provide
3 information about the scope of the privilege to Ms.
4 Jones. We ordinarily do not provide a privilege log in a
5 criminal case.

6 MS. GERAGOS: I would just add that in FIFA as
7 well, they did not give -- we don't see from the docket
8 that they gave information to the prosecution team that
9 included the matters of representation. It was simply
10 what we gave in our redacted charts to the government,
11 which was the firm name, domain name, attorney name and
12 dates of representation.

13 MS. PENZA: Your Honor, the hearing that was
14 held by the prosecution team in FIFA was to establish the
15 contours of a common interest agreement between an
16 individual defendant and CONMEBOL, one of the
17 organizations at issue.

18 Those types of common interest agreements and
19 third-party waiver are exactly the same kinds of general
20 scope, understanding, validity, privileges that we think
21 we can litigate. We just need the basic information,
22 nonprivileged information to assess exactly what's being
23 asserted, with whom the defendants are saying the
24 inclusion of this person on my communications with an
25 attorney does not waive the privilege, which is their

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1 burden and so to establish that the third-party -- that
2 that waiver didn't happen, they need to explain what that
3 -- who that person is and why.

4 THE COURT: Yeah, but they don't want to
5 explain it to you. They are okay with explaining it to
6 Ms. Jones and to me but they're not interested in
7 explaining it to you until there's some sort of decision
8 from the Court on the issue.

9 MS. PENZA: But even, your Honor, the basics
10 such as this is the function of this person, for example,
11 this person is a NXIVM employee or this person is a
12 person with whom I had a common interest agreement, even
13 that is information that is redacted from the redacted
14 charges.

15 MS. CASSIDY: Your Honor?

16 MS. PENZA: Presumably. I mean there's -- I
17 don't -- it just says a bunch of individuals. I assume
18 that there's information about what --

19 THE COURT: Okay.

20 MS. PENZA: -- the basis of the privilege is.

21 THE COURT: I'm looking at the one that's the -
22 - from Bronfman redacted and unredacted.

23 MS. JONES: There's --

24 THE COURT: I don't think you -- go ahead.

25 MS. JONES: I think there's much more

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1 information on the Clare Bronfman including in the
2 footnotes and I think that is -- there are a lot more
3 documents -- there are a lot more potentially privileged
4 documents that were seized from Ms. Bronfman than there
5 were from Mr. Raniere.

6 THE COURT: Uh-hum.

7 MS. CASSIDY: Yes, and your Honor the
8 government is looking at -- it is included in the
9 indictment and it is obvious from the search warrants
10 that what they are looking at with respect to Ms.
11 Bronfman in terms of evidence for trial and potential
12 additional charges against her, relate to some of these
13 very litigations.

14 THE COURT: Okay.

15 MS. CASSIDY: I have an absolute Fifth
16 Amendment right not to provide them with information.
17 This is similar to an active production issue.

18 THE COURT: All right. So the government, they
19 don't need to give you the information that's the
20 redacted information from the chart. I mean it's fairly
21 detailed and does touch on the substance of
22 representations and it's -- and it also seems like you
23 have the material, so they don't have to give it to you.

24 All right. So what do you want to do in terms
25 of what you're proposing with regard to starting to

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1 resolve these privilege issues? You're going to get Mr.
2 Sullivan's information. He and the government are going
3 to talk. Counsel and Ms. Jones are going to talk.

4 MS. PENZA: Your Honor, we would ask that you
5 direct defendants to specify to the prosecution team with
6 whom they seek to assert common interest privileges.
7 Those types of privileges for which there would be no
8 third-party waiver.

9 Merely identifying that is not privileged and
10 that's helpful for us and important for us to know
11 because as Ms. Jones explained, attorneys were shared
12 between defendants, between entities and it can get very
13 confusing unless the scope of the representation is made
14 clear.

15 MS. CASSIDY: Your Honor, I think that joint
16 defense agreements are themselves privileged. There's
17 case law on this. I mean, I don't agree.

18 THE COURT: The agreement is --

19 MS. CASSIDY: The fact of the agreement --

20 THE COURT: -- how -- all right.

21 MS. CASSIDY: -- and the scope of the agreement
22 and it also goes to again, the issues that are being
23 investigated in this case and so I should not be required
24 to provide information that the prosecution team is going
25 to turn around and cite as evidence in this case.

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1 MS. PENZA: Your Honor, establishing the
2 privilege is defendant's burden. They need not disclose
3 privilege information, obviously but that needs to be
4 actually privileged and much of the information including
5 identifying basic participants, identifying attorneys,
6 identifying with whom communications are privileged, that
7 in and of itself is not privileged.

8 MS. CASSIDY: And I will provide that
9 information to Ms. Jones.

10 THE COURT: So your position is that the fact
11 of a joint defense agreement, who the parties are to the
12 agreement, is privileged.

13 MS. CASSIDY: I believe on the facts of this
14 case, yes. And your Honor, I have not fully researched
15 this because I don't think we're at that point --

16 THE COURT: Uh-hum.

17 MS. CASSIDY: -- I haven't yet, you know, had
18 questions from the firewall team about -- and I don't
19 think there are very many, if any, communications that
20 are even implicated by the common interest privileges in
21 question here.

22 MS. PENZA: We don't agree, your Honor and
23 we've asked defense counsel to provide that information
24 to us. We're happy to submit a letter as to why this
25 information is not privileged.

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1 THE COURT: Sure.

2 MS. CASSIDY: Your Honor, they haven't seen the
3 documents. They don't -- so they don't know how many
4 documents there are that are implicated by the common
5 interest privilege. I actually don't think it's very
6 many but I could have these discussions with Ms. Jones
7 and maybe we don't need to have this argument.

8 THE COURT: Okay. So why don't you try to
9 resolve it by the middle of next week. If you haven't,
10 you can each put a letter in as to why the facts as to
11 whether there is a joint defense agreement is privileged
12 and we'll go from there.

13 All right. What about the bigger picture of
14 these other issues? What time line are you proposing
15 here?

16 MS. PENZA: Your Honor, the government would
17 propose early January.

18 THE COURT: For what part of this?

19 MS. PENZA: Assuming, your Honor, that we're in
20 a position to understand what privileges the defendants
21 seek to assert, we can report to the Court as to whether
22 or not a hearing is necessary to resolve those issues by
23 early January.

24 THE COURT: That's not going to slow this all
25 down.

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1 MS. PENZA: Your Honor, it is difficult to --
2 without having seen -- without understanding the basic
3 information underlying the claimed privileges, it is
4 admittedly difficult to foresee how a briefing or a
5 hearing would go and so it is --

6 THE COURT: I know but --

7 MS. CASSIDY: That's my point.

8 THE COURT: -- now we're back to where we
9 started which is why isn't this with Ms. Jones? You
10 know, you're telling me that, you know, you understand
11 the big picture privilege questions and can put them in
12 the context of the case with greater ease of Ms. Jones,
13 who has really a slice of the case, not the whole case,
14 and that's exactly the defendants' point as to whether
15 it's more efficient or not.

16 MS. PENZA: Your Honor, yes, but identifying
17 those areas -- we've identified some areas of dispute.

18 THE COURT: Okay.

19 MS. PENZA: We're prepared to move on. As to
20 the others, it is difficult because we -- defense counsel
21 and the government apparently disagree about whether the
22 underlying information is, in fact, privileged, even to
23 proceed.

24 But assuming we can work those details out, we
25 think early January makes sense for us to move and set

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1 forth a process by which those issues would be resolved
2 either by briefing or by a hearing.

3 THE COURT: I think that's going to be way too
4 slow. I mean I want to know either now or next week what
5 you're proposing in terms of getting this done. I mean,
6 because you're talking about -- I don't know if anyone
7 needs to reply but two briefs, maybe a hearing, in time
8 for me to make a decision and then however that decision
9 is made, the documents will be produced or not produced,
10 depending on what happens --

11 MS. PENZA: Your Honor --

12 THE COURT: -- and you're up against your --
13 all your other briefing.

14 MS. JONES: Well, we haven't even run terms
15 against Nancy Salzman's material. That's millions of
16 documents.

17 THE COURT: Those are the new ones?

18 MS. JONES: No.

19 THE COURT: The old ones?

20 MS. JONES: This is NXIVM where we have been
21 waiting for --

22 THE COURT: Okay.

23 MS. JONES: -- NXIVM's attorneys. So in terms
24 -- like I think this is a reasonable schedule in terms of
25 trying to efficiently deal with as many of these issues

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1 wholesale as we can, including also the new returns, to
2 the extent we can.

3 So I think that ultimately it will be more
4 efficient to put more time on this end, so that more of
5 those issues can be resolved and again, your Honor, the
6 government believes that initial briefing can include
7 both briefing from the trial team, as well as
8 supplemental briefing from the firewall team.

9 So we don't necessarily think that thee have to
10 proceed seriatim.

11 THE COURT: Seriatim. Right.

12 All right, defense counsel, thoughts on the
13 timing?

14 MS. CASSIDY: I don't object to early January.
15 I think the more discussions that I can have with the
16 firewall team, you know, now will make this process more
17 efficient in the long run but I don't know where she is
18 in her review.

19 MR. SOLOWAY: Judge, can I say one thing on
20 behalf of Nancy Salzman on this.

21 THE COURT: Uh-hum.

22 MR. SOLOWAY: And that is just that, you know,
23 I would like to avoid any unnecessary litigation with
24 respect to privilege, obviously and Nancy Salzman, whose
25 name hasn't really come up a lot here, other than with

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1 respect to Arlen Olsen who is kind of in a separate
2 category and I am not going to really address right here,
3 but has taken a -- what we consider to be a very
4 straightforward position here is that she neither waives
5 nor asserts a privilege on behalf of NXIVM, even though
6 she was president, but does assert privilege with respect
7 to her personal attorney-client relationships with her
8 lawyers.

9 And we, back in early November -- now we're at
10 December 6th, provided a detailed list of the matters --
11 in response to Ms. Jones' questions of the matters on
12 which our client was represented, the dates, the names of
13 the matters, the docket numbers, that we're asserting
14 personal privilege.

15 THE COURT: Uh-hum.

16 MR. SOLOWAY: For example, in 2000, Nancy
17 Salzman was represented by someone named by Leslie Apple
18 as a claimant in a bankruptcy matter that was initiated
19 to obtain a bankruptcy by someone named Tony Natalie
20 (ph.). Nancy asserted or contested rather that discharge
21 in the bankruptcy court, at least as to her debt. She
22 was represented individually in that matter with respect
23 to that and there are other matters like that, a discrete
24 piece of litigation involving the loss of a computer on
25 an airplane in which Ms. Salzman initiated litigation

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1 against I think it was Continental Airlines, for the
2 value of the computer and the value of the data on the
3 computer.

4 We haven't received any -- you know, we have
5 been expecting that the government will be providing us,
6 you know, with a universe or in some fashion, those
7 documents that fall within, you know, the information
8 we've given them and so that we can, you know, take -- we
9 hope that we can just resolve -- you know, that these --
10 the government will segregate out the tainting, will
11 segregate out these items. There won't be any disputes
12 about them.

13 That's also true of a major piece of litigation
14 that occurred for more ten years in both New Jersey and
15 the Northern District of New York where Nancy Salzman
16 again has asserted a personal privilege on behalf of a
17 particular lawyer, a particular law firm, which
18 represented her individually in that case and there are
19 parallel NXIVM privileges in that -- and that's the Ross
20 litigation. Everybody in this room knows that but --

21 Nancy Salzman -- we haven't received anything
22 from the government for us to figure out whether or not
23 the government -- are there any disputes over privilege
24 with respect to these discrete matters. So I am not sure
25 --

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1 You know, the schedule that we're setting for
2 litigation, I mean we're happy to have a schedule but we
3 don't know what the position of the government is, we
4 don't know whether the government -- where the government
5 is in providing us with these items that fall within the
6 information we've given them in response to their
7 question.

8 MS. JONES: Your Honor, may I speak briefly on
9 this? The government has provided these materials to
10 Keith Raniere and Clare Bronfman. They are segregated
11 materials.

12 Mr. Soloway, the first time we had heard about
13 this as an issue was in the letter to your Honor. We
14 have now worked with Kroll and we will be providing him
15 the segregated materials today. They have been
16 segregated and have been part of our ongoing review.

17 So there's been no delay in terms of the
18 materials as to which there's been a personal privilege
19 asserted. Mr. Soloway has all of those materials
20 available to him. One phone call, if he had called me,
21 we would have sent the materials over. So --

22 MR. SOLOWAY: I don't know what that means.

23 MS. JONES: Waiting until --

24 MR. SOLOWAY: I'm sorry, I --

25 THE COURT: One at a time.

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1 MS. JONES: -- waiting until writing a letter
2 to your Honor was unnecessary and you would have had the
3 materials.

4 THE COURT: All right. You can have that
5 timing question between yourselves. It's not really
6 affecting what I am dealing with here today.

7 So you're saying you don't know what the
8 government's -- if I understand this, you don't know what
9 the government's position is as to whether they agree
10 with and respect the privilege that you have asserted
11 with regard to these materials? You have the materials,
12 you just don't know what the government's position is
13 with regard to them using the materials, is that right?

14 MR. SOLOWAY: The government has the materials
15 is sounds like.

16 THE COURT: Right.

17 MR. SOLOWAY: The government has not provided
18 them to me. The fact that the Court was alerted to the
19 fact in a letter recently that none of the materials have
20 been provided to Nancy Salzman's counsel, is -- that's
21 not my job to call them up and say send them to me. The
22 information I had from the government was that they were
23 doing Clare Bronfman and Keith Raniere first.

24 THE COURT: Right.

25 MR. SOLOWAY: And then they would get to me and

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1 I should just wait and they would do that. So how -- you
2 know, it's not my job to call them up and say hey, have
3 you -- when are you going to send me this stuff?

4 I have been responding to their questions and
5 waiting for them to do what they said they were going to
6 do, so that I can move through this process in a way
7 that's orderly and we've been hoping that we could avoid
8 any -- in the way that we have decided to proceed in this
9 matter on behalf of Nancy, any issues but we --

10 So we will wait for the government. The
11 government is indicating they have now segregated them.
12 It sounds like they're going to be sending me something
13 and we'll be in a position to have conversations,
14 hopefully, about that when I receive that.

15 MS. JONES: Your Honor, I just want to be
16 clear, Mr. Soloway has had all of the materials all
17 along. If there were categories of documents -- there is
18 no specific issue that has not been able to be talked
19 about because of a delay on sending segregated materials.

20 THE COURT: All right. Just so I understand
21 what you're looking for is the government's
22 identification or acknowledgment of the privilege that
23 you've asserted. Is that what it is?

24 MR. SOLOWAY: There --

25 THE COURT: And that you want to know if

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1 there's a disagreement.

2 MR. SOLOWAY: -- should be segregated out by
3 the taint team, as I understand it, a universe of
4 materials that is not available to the government, that
5 is potentially privileged communications between my
6 client and an attorney. That material -- the government
7 has turned over, it's true, all of the discovery and
8 terabytes and terabytes which they describe in some of
9 their letters about millions of million documents.

10 That's not what I am talking about. I'm
11 talking about the taint team providing me with a
12 segregated universe or body of material over which we
13 have to have discussions as to whether or not there are
14 disagreements as to privilege. Not that they've given me
15 all of the discovery. Yes, they have given me but I am
16 not looking through the discovery myself. I am not like
17 NXIVM which is subpoenaed as Ms. Cassidy indicated, that
18 has to go through all the material and write a privilege
19 log for the government.

20 The government -- we have given the government
21 the information they want. They have to segregate out,
22 as I understand it, those materials which fall within
23 what we have provided them and see whether or not we have
24 agreement or disputes in this segregated body of
25 material, not available to the trial team and the case

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1 investigation team. They're not looking at that material
2 presumably.

3 THE COURT: Right. So again, you have
4 identified what you believe are the privileges.

5 MR. SOLOWAY: Right.

6 THE COURT: You're waiting for Ms. Jones'
7 team's response to whether they acknowledge that, agree
8 with you, disagree as it applies to the documents that
9 she is reviewing.

10 MR. SOLOWAY: And provide me the documents.

11 MS. JONES: Your Honor, I --

12 THE COURT: All right. So this really seems
13 like your question.

14 MS. JONES: Your Honor, I did not realize that
15 there was an issue. My understanding was that, for
16 example, I have been looking at for Nancy Salzman and the
17 privilege space, we have a laptop, two BlackBerrys and a
18 thumb drive.

19 And so I have like a -- I have a set of
20 documents that have privilege hits on them. It was my
21 understanding that entire copies of the laptop, the thumb
22 drive, and the BlackBerry privilege and nonprivileged,
23 everything, was provided to defense counsel and it was my
24 understanding that they would be able to -- we would be
25 able to confer about these items.

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1 What I think may be helpful in what we're doing
2 now is I did not understand that Mr. Soloway did not have
3 a way to look at this -- to quickly find the same
4 documents because I emailed him and said I don't think
5 these documents are privileged. Here are the relativity
6 I.D. numbers for these five documents. Let me know if
7 you disagree.

8 And then he emailed me back saying well, what's
9 the Bates numbers and I am like, well I have a relativity
10 I.D. Anyways, we'll sort it out.

11 THE COURT: Okay.

12 MR. SOLOWAY: Relativity I.D. for what? I
13 don't --

14 THE COURT: Okay.

15 MS. JONES: That's --

16 THE COURT: There's no point in me hearing this
17 because you all don't even have the fundamentals, so just
18 for the logistics, so talk. See if you can coordinate
19 and if there is a disagreement -- first you have to
20 identify what the disagreement is and as to which
21 documents and then have the conversation and then if you
22 can't agree, you can let me know. Okay?

23 So it seems what you're proposing is that in
24 the next three weeks, you're going to try to make
25 significant progress on these privilege issues, these

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1 conversations, particularly with defense counsel and Ms.
2 Jones and especially with getting the information from
3 NXIVM and speaking with NXIVM about their list.

4 And then really whatever is left over, which
5 sounds like it may be somewhat significant, I am not sure
6 you're all going to agree to that much but maybe you
7 will, then we're going to have briefing or at least a
8 conversation and go from there but my practical question
9 is I understand we're getting to the end of the year
10 holiday season but do you really need the three weeks to
11 do this?

12 MS. CASSIDY: Well, your Honor, just following
13 up on what Mr. Soloway said.

14 THE COURT: Uh-hum.

15 MS. CASSIDY: So there's the second search
16 warrant that was executed on Ms. Bronfman's email and the
17 government has provided me with the entirety of that
18 search warrant return but I don't have a privilege set of
19 documents from that set of emails.

20 THE COURT: So it's the same logistics issue.

21 MS. CASSIDY: So it's the same, just --

22 MS. GERAGOS: I will add that for Mr. Ranieri
23 because of technical difficulties on their end, we don't
24 have the full return yet for the second search warrant on
25 Mr. Ranieri's Yahoo! account.

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1 THE COURT: All right. Can you please all talk
2 about these technical issues and then --

3 MS. GERAGOS: I believe they're giving them
4 over and hopefully this week, but I just wanted to
5 explain that.

6 THE COURT: Okay. So that leaves you getting
7 materials in the next couple of days. Still back to the
8 question that still has basically three weeks before
9 you're suggesting we meet again and talk about or at
10 least meet via your written filings and figure out how
11 this is going to go forward.

12 So do you need that much time?

13 MS. HAJJAR: Your Honor, we're happy to -- if -
14 - particularly if defense counsel thinks it useful, we're
15 happy to have those conversations and see where we can
16 reach agreement. The one area of dispute that I don't
17 expect will be resolved is this disagreement about
18 whether or not a claim of privilege in the abstract is
19 itself privileged. I don't expect we'll resolve that.
20 Should your Honor wish for us to submit a brief letter
21 about the law on that issue, we're happy to but it's not
22 -- those basic informations about (indiscernible) one
23 intends to assert are not themselves privileged and I
24 think the case law is quite clear on that.

25 MS. CASSIDY: I'm not sure I understand what

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1 Ms. Hajjar was explaining just now.

2 MS. HAJJAR: The --

3 THE COURT: I think this was the point that you
4 all had raised earlier about whether the fact of a joint
5 defense agreement and the parties of a joint defense
6 agreement, its existence in and of itself, is privileged.
7 That's the point you were talking about, right?

8 MS. HAJJAR: The validity and scope. Correct,
9 your Honor.

10 THE COURT: Uh-hum.

11 MS. HAJJAR: The validity and scope of a
12 privilege.

13 MS. CASSIDY: Of a joint defense agreement? Of
14 a joint defense privilege or --

15 MS. HAJJAR: The --

16 MS. CASSIDY: -- all privileges?

17 THE COURT: I think we're talking about joint
18 defense.

19 MS. HAJJAR: Yes, your Honor, unless there are
20 other privileges or other sort of unique privileges the
21 defense expects to raise but those types of privileges,
22 the character of them, that is not privileged and we
23 would like basic information, the same information that
24 NXIVM has provided us, basic information about whose
25 representing whom, when and whether the inclusion of a

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1 third-party destroys that privilege. That's
2 nonprivileged information.

3 MS. CASSIDY: I thought that your Honor said we
4 do not have to provide any further information beyond the
5 redacted chart that we have already provided to the
6 prosecution team and we will look at the issue of the
7 existence of a joint defense or common interest agreement
8 and if we decide that, you know -- if we agree that that
9 is itself not privileged, we can provide that information
10 but other than that, I do not intend to provide any
11 further information to the prosecution team, other than
12 if, you know, new attorneys come up in, for example, my
13 review of the new search warrant return materials and I
14 intend to have those conversations with Ms. Jones and I
15 understood your Honor to be saying that that was the
16 procedure we could follow.

17 THE COURT: I did but I was saying about not
18 providing more information was you don't have to provide
19 these charts or the information that the government was
20 requesting and then you raised -- then there's this
21 additional probably slice of that conversation which is
22 the government's position that -- well, it's really your
23 position that even that there is a joint defense
24 arrangement is something that you don't have to identify.
25 So you might not provide all of the information, even

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1 though you have provided on the charts, I think is where
2 this goes.

3 All right. Why don't you -- it seems that the
4 most efficient way right now since you're going to have
5 conversations is for you to talk -- for defense counsel
6 and Ms. Jones to speak, see if you can resolve these
7 questions and if you can't, then it does seem say by the
8 end of next week, you should let me know where you are on
9 that and then it doesn't seem -- it seems like a letter
10 brief on this point from each side would be enough.

11 All right. So it would be helpful to know if
12 there are significant areas that you think that you are
13 not going to be able to come to an agreement or that you
14 think that it's possible that you would come to an
15 agreement because if there are areas, as Ms. Hajjar is
16 suggesting, that you know now it's unlikely that you're
17 going to come to an agreement, then we should move the
18 process of the briefing ahead, although it doesn't mean
19 no one is going to really enjoy the end of the year but
20 that's what it is when you are on a tight schedule.

21 All right. Are there other -- so basically,
22 you're going to talk. Let me know where you are at the
23 end of next week on these issues, at least in terms of a
24 schedule. All right.

25 Are there other discovery issues? Things you

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1 don't have? Things you're expecting? Anything? We've
2 had multiple iterations of this process. Okay.

3 And, for the government, do you expect you're
4 going to bring this issue about the search warrants up
5 today? Is that what you expect? This is your letter of
6 December 4th.

7 MS. PENZA: With Judge Garaufis?

8 THE COURT: Yes.

9 MS. PENZA: Yes, your Honor.

10 THE COURT: All right. Is that at 11?

11 MS. PENZA: Yes.

12 THE COURT: What time is that conference, at
13 11? Okay.

14 And then the Curcio issue, assume you're going
15 to talk about that. Often those hearings, if you are
16 having a hearing, are handled by the magistrate judge. I
17 don't know what Judge Garaufis would like but just for
18 your information, if we were going to -- if I end up
19 being the person having those, we would probably do it
20 ideally next Wednesday or next Thursday morning or both,
21 depending on the timing and who is available, et cetera.
22 Judge Garaufis may do it, as well.

23 Are there other issues?

24 MR. SOLOWAY: I just wonder, your Honor, one
25 thing and that is, you know, if there was a

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1 representation at a certain point and people went back
2 and forth on it as to what was called the discovery cut-
3 off date by the defense and the discovery --

4 THE COURT: I've been oft quoted.

5 MR. SOLOWAY: Yes.

6 THE COURT: Yes.

7 MR. SOLOWAY: And I know that your Honor's --
8 and the ruling ended up being that, you know, the
9 government would do something like make their best
10 efforts to produce all of the discovery on or before
11 December 7th. I am wondering if the new search warrant
12 has changed that and the new -- yeah, new -- the three
13 new search warrants in this (indiscernible).

14 THE COURT: All right. I think that's -- fill
15 out what I believe I said or was trying to say was that
16 the government was on notice that they had had a
17 significant amount of time with the documents and would
18 need to be making their best effort to make the
19 productions and it would be your and your colleague's,
20 you know, professional judgment at what point you wanted
21 to make whatever motions you wanted to make related to
22 the trial, if you felt that you didn't have enough of the
23 materials to be able to have a defense and it would be in
24 light of that schedule that you could make those motions
25 but that it was not an absolute deadline but an

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1 expectation.

2 So against that backdrop, where is the
3 government with regard to the production on the most
4 recent materials?

5 MS. PENZA: We discussed this with your Honor
6 last time. All discussions regarding the December 7th
7 date, regardless of characterization, were always based
8 on the documents that were in the government's possession
9 when we were having those conversations.

10 We have only received those returns within the
11 past month, technical getting them uploaded. As your
12 Honor knows, that is a process.

13 THE COURT: Uh-hum.

14 MS. PENZA: We are in the process of searching
15 them and we expect to make productions on a rolling
16 basis.

17 As to Nancy Salzman's materials, once again, I
18 reiterate that we are waiting on NXIVM's attorneys to
19 provide us a list because we are concerned that there are
20 potentially privileged materials that have not been
21 segregated out based on our original understanding that
22 Nancy Salzman, as president of NXIVM, if there were
23 privileges to assert, would have asserted them the same
24 way other defendants who were affiliated with NXIVM did.

25 So now we're in a different place. We're in a

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1 holding pattern. When we have that, we will be able to
2 produce some materials and we'll continue to do so on a
3 rolling basis consistent with our obligations.

4 THE COURT: So if you have that information, as
5 much as you would need it, which hopefully you're getting
6 tomorrow from Mr. Sullivan and whatever follow-up you
7 need next Tuesday, do you have a sense of what the time
8 line is likely to be?

9 MS. PENZA: Well, there will certainly be a
10 production quickly thereafter of Bates-stamped materials
11 once we can run those terms but our search is ongoing and
12 as your Honor knows, we only received the warrant a
13 little over a month ago. So our search continues.

14 THE COURT: So that means?

15 MS. PENZA: We are not going to give a date as
16 to which we will -- we will produce on a rolling basis.
17 This is only a month ago that we got a search warrant.
18 We have an ongoing investigation, your Honor.

19 THE COURT: All right. But you also have trial
20 date, so that's --

21 MS. PENZA: Right, and so --

22 THE COURT: There's tension, you know?

23 MS. PENZA: Of course and our understanding is
24 if there comes a time when defense counsel wants to move
25 regarding evidence at trial, they will be able to do so.

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1 THE COURT: All right. Other issues?

2 MS. CASSIDY: Your Honor, just something that
3 Mr. Soloway said made me realize that I don't believe we
4 received with respect to the devices where there may be
5 Nancy Salzman's personal privilege information, I don't
6 believe that the other defendants have received the
7 nonprivileged segment of those devices.

8 MS. PENZA: We have produced the entirety of
9 Nancy Salzman's materials to all defendants.

10 THE COURT: All right.

11 MS. PENZA: That was subject to -- through
12 (indiscernible), that was subject to our earlier motion
13 to be able to produce and then we reached an agreement
14 with defense counsel, so --

15 MS. CASSIDY: Okay.

16 THE COURT: So you do have it or you don't have
17 it?

18 MS. CASSIDY: I take their word for it. There
19 are a lot of devices but I take their word for it.

20 THE COURT: Okay. Let me just check in on the
21 devices that you had to send to the FBI and you were in
22 the cue. Progress?

23 MS. PENZA: We don't have an update for you,
24 your Honor.

25 THE COURT: Okay. All right. Anything else?

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1 All right. If there is an update that I should
2 know from Judge Garaufis' hearing or whatever the
3 proceeding is, you can let me know. All right. Thanks
4 very much.

5 IN UNISON: Thank you, your Honor.

6 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 6TH day of December, 2018.


Linda Ferrara

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